Supreme Court of the United States

October Term, 1956

No. ~~1059~~ 165

In the Matter of the Application of

MAX LERNER,

Appellant,

For an Order Under Article 78 of the Civil Practice Act,

against

HUGH J. CASEY, WILLIAM G. FULLEN, HARRIS J. KLEIN, HENRY K. NORTON, and DOUGLAS M. MOFFAT, constituting the New York City Transit Authority,

Appellees.

On Appeal From the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

(a) Reports of the Opinions in the courts below.

This case was instituted by petition to the Supreme Court of the State of New York, Kings County. The application was denied and the petition dismissed. The opinion of the court is reported in 138 N. Y. Supp. 2d 777.

Appellant appealed to the Appellate Division of the Supreme Court of the State of New York, Second Judicial

Department, from the order denying the application and dismissing the petition. The Appellate Division (one of the five Justices dissenting) affirmed the order below. The opinions of the Appellate Division are reported in 2 App. Div. 2d 1, 154 N. Y. Supp. 2d 461.

An appeal from the order of affirmance was taken to the Court of Appeals of the State of New York. The Court of Appeals (two of seven Judges dissenting) affirmed the order of the Appellate Division. The opinions of the Court of Appeals are reported in 2 N. Y. 2d 355.

(b) The Grounds on which jurisdiction of the Supreme Court of the United States is invoked.

(i) The proceeding was instituted to review and annul the appellees' resolutions suspending and discharging appellant under the Security Risk Law of New York State, L. 1951, c. 233, as amended L. 1954, c. 105, from his position as subway conductor. The proceeding was brought pursuant to Article 78 of the Civil Practice Act of the State of New York relating to causes in the nature of mandamus and certiorari proceedings.

(ii) The decree sought to be reviewed was made by the Court of Appeals of the State of New York on February 28, 1957 and entered on the same day. The notice of appeal to the Supreme Court of the United States was filed on April 25, 1957 in the Supreme Court of the State of New York, Kings County.

(iii) Jurisdiction of the appeal is conferred on this Court by 28 U. S. C., § 1257(2).

(iv) Cases sustaining the jurisdiction of this Court are: *Hamilton* v. *Regents of the University of California*, 293 U. S. 245; *McCollum* v. *Board of Education*, 333 U. S. 203; *Wieman* v. *Updegraff*, 344 U. S. 183; *Garner* v. *Los Angeles*

Board, 341 U. S. 716; *Slochower* v. *Board of Higher Education*, 350 U. S. 551, rehearing denied, 351 U. S. 944.

(v) The validity of the Security Risk Law of New York, N. Y. Laws 1951, c. 233 as extended, N. Y. Laws 1954, c. 105, as construed and applied by the New York Court of Appeals, is involved. The text of the statute appears in the Appendix.* It may also be found in McKinney's Unconsolidated Laws of the State of New York, §§ 1101-1108.

(c) Questions presented by the appeal.

1. Whether the dismissal from public employment of a subway conductor with tenure contravenes the due process clause of the Fourteenth Amendment to the Constitution of the United States, where such dismissal is upon the ground that he is a security risk, the sole evidence thereof being the invocation of his constitutional privilege against self-incrimination.

2. Whether his dismissal for "activities which give reasonable ground for belief that he is not a good security risk" contravenes the due process clause of the Fourteenth Amendment, where he was never served with charges of such activities, there was no hearing, and he has never been informed of the nature of the "activities."

3. Whether his dismissal for possible membership in the Communist Party violates his right to freedom of speech, assembly and association under the Fourteenth Amendment to the Constitution of the United States when the possibility of such membership is inferred from his invocation of the constitutional privilege and *scienter* is not charged.

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* Statutory references are to the sections as they appear in the Appendix.

4. Whether his privilege against self-incrimination under the Fifth Amendment to the United States Constitution and his immunities and privileges under the Fourteenth Amendment thereto were abridged by his dismissal from public employment because he had asserted his constitutional privilege in a proceeding conducted by state authorities in pursuance of the federal government's security program.

5. Whether the state court's interpretation and application herein of the privilege against self-incrimination under the State Constitution, Article I, § 6, is not so restrictive and inconsistent with that court's liberal construction and application of the privilege in cases involving public officials, members of the bar and other persons as to deny appellant the equal protection of the laws under the Fourteenth Amendment to the United States Constitution.

6. Whether the determination that appellant's work was "necessary to the security and defense of the nation and the state" was in violation of his right to due process under the Fourteenth Amendment when the making of such determination was without notice to appellant and without evidence or hearing, and, further, was arbitrary and unreasonable in view of the nature of his duties.

7. Whether appellant has not been denied due process under the Fourteenth Amendment to the United States Constitution by reason of his dismissal upon findings, *inter alia*, that the Communist Party was a "subversive organization" and that the New York City Transit Authority was a "security agency" within the meaning of the Security Risk Law, N. Y. Laws 1951, c. 233 as amended, when he was not a party to any proceeding making such findings and was not afforded, under the said statute, any opportunity to challenge such findings.

(d) The material facts of the case.

Appellant Max Lerner was a subway conductor in the transit system of New York City since November 1, 1935. Appellees, constituting the New York City Transit Authority, a public benefit corporation, were his last employers. (N. Y. Public Authorities Law, § 1801.) Appellant's duties consisted of opening and closing subway car doors. He had tenure under the Civil Service Law of New York State.

On March 24, 1951, the Security Risk Law, *supra*, became effective, authorizing the summary discharge as security risks of employees in "security positions" or "security agencies" so designated by the State Civil Service Commission. The statute, modeled after that involved in *Cole* v. *Young*, 351 U. S. 536, defined such positions and agencies as those involving the performance of functions "necessary to the security or defense of the nation or the state" or "where confidential information" relating to such security might be available (§ 2).

The statute recited four examples of "previous conduct", evidence of which made one a security risk. One was "membership in any organization found by the State Civil Service Commission to be subversive" (§ 7).

On November 23, 1953 the Commission without notice, hearing or evidence designated the New York City Transit Authority a security agency. On March 24, 1954 the Commission designated the Communist Party a subversive organization under the Security Risk Law, adopting, without notice, hearing or evidence, the finding to that effect made by the New York State Board of Regents under the Feinberg Law, N. Y. Laws 1949, c. 360.

In September and October 1954, appellant, upon direction from his superiors, appeared before a Deputy Commissioner of Investigation of the City of New York. No charges had been served upon him; he was merely told

that an investigation was being conducted under the Security Risk Law and that he would be dismissed under § 903 of the New York City Charter if he refused to answer questions.* He was then asked whether he was or ever had been a member of the Communist Party and he declined to answer, relying upon his constitutional privilege against self-incrimination.

Appellant was thereupon suspended by appellees on the ground that he had invoked his constitutional privilege before the Deputy Commissioner of Investigation. The letter of suspension gave him thirty days to file an answering statement. Since the ground for suspension was limited to his invocation of the constitutional privilege, an act which was not denied, appellant made no further reply.

On November 24, 1954, appellant was discharged by the appellees on two grounds: first, that he had asserted his constitutional privilege and, second, that "further investigation has revealed activities on the part of Max Lerner which give reasonable ground for belief that he is not a good security risk."

The foregoing federal questions sought to be reviewed were raised by appellant in the state courts as follows:

Appellant's petition in the court of original jurisdiction alleged that the Security Risk Law as written and applied and the appellant's suspension and discharge were in violation of his federal constitutional rights (fols. 45-46). More specifically, it was alleged *inter alia* by appellant:

> "The Security Risk Law is unconstitutional in that as written and as applied it is inconsistent with procedural due process. The charges which may be made thereunder are necessarily vague and indefinite. The standards set forth therein are similarly vague and indefinite. It provides for the considera-

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* This representation with regard to dismissal was inaccurate since appellant was not employed by the City of New York. The Charter provision is that involved in *Slochower* v. *Board of Higher Education*, 350 U. S. 551.

> tion of secret evidence and deprives one affected thereby of the opportunity to be confronted by witnesses or to rebut unfavorable testimony. The Security Risk Law is further unconstitutional in that, as written and as applied herein, it acts to deprive of substantive due process. Assertion of a constitutional privilege cannot be grounds for discharge from employment." (fols. 45-46)*

The federal questions sought to be reviewed were also raised in appellant's briefs in the Appellate Division and in the Court of Appeals of the State of New York.

The courts passed upon the questions raised by upholding the validity of the statute and appellant's suspension and discharge thereunder. The Court of Appeals expressly held that appellant's dismissal for assertion of his constitutional privilege against self-incrimination did not deny him procedural and substantive due process under the Fourteenth Amendment to the Constitution, did not violate his right to freedom of speech, assembly and association under the said Amendment, and did not violate his privilege against self-incrimination under the Fifth Amendment and his immunities and privileges under the Fourteenth Amendment (Appendix, pp. 34, 37-41).

The Court of Appeals did not discuss in its opinion two issues raised in appellant's briefs: (1) that he was denied the equal protection of the laws under the Fourteenth Amendment because of the discriminatory construction of the state constitutional privilege against self-incrimination and (2) that there was a denial of due process under the Fourteenth Amendment in the alternative ground for dismissal—namely, his "further activities", a term never explained by appellees. However, the issues were squarely raised and the holding of the Court of Appeals affirming the order below necessarily passed upon and rejected these contentions.

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* Folio references are to the numbered folios of the papers on appeal to the Court of Appeals of the State of New York.

The dissenting opinions in the Court of Appeals held that appellant was deprived of his right to due process under the Fourteenth Amendment to the United States Constitution (Appendix, pp. 41, 43-48).

(e) The federal questions are substantial.

(1) The statute denies appellant due process under the Fourteenth Amendment.

A. The statute authorizes the discharge of a public servant with tenure upon *evidence* that "reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state" (§ 5).

The only so-called "evidence" in this case was appellant's refusal to answer questions as to membership in the Communist Party, based upon his constitutional privilege against self-incrimination. This case does not require any evaluation of conflicting evidence to determine if it "rationally supports a finding of doubt about his character or loyalty" (*Konigsberg* v. *State Bar of California*, 77 S. Ct. 722, 728) for appellees make no claim of such evidence.

The state court's conclusion that appellant was a bad security risk because he had asserted his constitutional privilege was "arbitrary action" violative of the "very essence of due process" *Slochower* v. *Board of Education*, 350 U. S. 551, 559. First, it gives "a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment" (*Slochower*, *supra*, at 557) which history, reason and this Court's most recent decisions condemn as irrational. *Quinn* v. *U. S.*, 349 U. S. 155. Secondly,

it imposes "undue restraint or invidious consequences" upon the exercise of the privilege (Fuld, J., dissenting, Appendix p. 45).

The refusal to answer questions is not evidence of wrongdoing or poor moral character. *Konigsberg* v. *The State Bar of California, supra.* Reliance upon the constitutional privilege against self-incrimination, indeed, is further legal justification for the refusal.

The state court's reliance upon *Garner* v. *Los Angeles Board,* 341 U. S. 716 was misplaced. (See Van Voorhis, J., dissenting, Appendix p. 47.) That case, unlike this one, involved an explicit statutory duty of disclosure; it did not hold that the refusal to answer was evidence of unreliability. See *Konigsberg v. The State Bar of California, supra.* The state court's attempt to distinguish *Slochower* upon the ground that the privilege was there asserted with respect to past Communist Party membership would establish a novel limitation upon the privilege. The court's reliance upon appellant's refusal to explain his assertion of the privilege would destroy its value.

B. Appellees' resolution dismissing appellant referred without any explanation to his "further activities." This action contravened appellant's right to due process under which he was entitled to (1) reasonable notice of the charges, *In re Oliver,* 333 U. S. 257, 273; *Morgan* v. *United States,* 304 U. S. 1; (2) "a fair and open hearing" on such charges, *St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 73; *Morgan* v. *United States, supra; Goldsmith* v. *United States Board of Tax Appeals,* 270 U. S. 117 and (3) a decision indicating the nature of such activities.

Appellant has never received notice or charges of such "activities", has not been presented with evidence thereof and has not even been told what is intended by that language. The discharge for undisclosed reasons not the

subject of prior charges or hearing raises "questions of elemental fairness" as serious as those involved in *Konigsberg* v. *State Bar of California, supra*, p. 727; *Cole* v. *Arkansas*, 333 U. S. 196, 201, and *Parker* v. *Lester*, 235 Fed. 2d 787 (C. A. 9).

C. The State Civil Service Commission declared that the Transit Authority was a security agency, thereby avoiding the need to determine whether appellant's innocuous position as subway conductor had any relation to national security.

This designation was made following hearings conducted by the House Committee on Un-American Activities in New York State in 1953.* (See *Interim Report of Committee on Public Employee Security Procedures*, p. 22**). It was made without even the forms of quasi-judicial hearing and consideration or notice and opportunity to appellant and others to contest. It is therefore completely devoid of due process. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U. S. 123.

D. Similarly, appellant was not notified and did not participate in any proceeding wherein it was found that the Communist Party was a "subversive organization." This designation was originally made by the Board of Regents of New York on September 24, 1953 pursuant to the New York Feinberg Law. (N. Y. Laws 1949, c. 360;

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* Hearings, Committee on Un-American Activities, House of Representatives, 83d Congress, 1st Session, July 13 and 14, 1953 and April 7-9, 1954, in "Investigation of Communist Activities in the Albany, N. Y. Area".

** This Committee, appointed by Gov. Harriman on September 15, 1956 to study New York laws relating to the loyalty or security of public employees, made its report on January 28, 1957, criticizing the Commission for designating as security agencies governmental departments whose "immediate connection with the security and defense of the nation and the state is not readily discernible"

see *Adler* v. *Board of Education of the City of New York*, 342 U. S. 485.)

The Civil Service Commission, without holding any hearings, merely adopted the Regents' findings. The Security Risk Law, unlike the Feinberg Law, permits no employee challenge of such findings. Nor, unlike the Feinberg Law, does it limit discharges to persons who remain members after such findings, or require *scienter* before the dismissal of an employee. (*cf.* Security Risk Law, § 6 with the Feinberg Law, which makes membership only *prima facie* evidence of disqualification. *Adler* v. *Board of Education*, 342 U. S. at 485, citing 301 N. Y. 476 at 494.) In these respects appellant was denied procedural due process. *Wieman* v. *Updegraff*, 344 U. S. 183.

(2) The discharge violated appellant's freedom of speech, belief, assembly and association under the Fourteenth Amendment.

The state court inferred possible membership in the Communist Party from appellant's assertion of privilege. Quite aside from the impropriety of any such inference (*supra*, pp. 8-9), a discharge in 1954 of a subway conductor even for proven membership, past or present, in the Communist Party, without more, would violate appellant's freedom of speech, assembly, belief and association under the Fourteenth Amendment. *Konigsberg* v. *State Bar of California*, *supra*, p. 730, and cases cited; *Schware* v. *Board of Bar Examiners of the State of New Mexico*, 77 S. Ct. 752, 758-760, and ftn. 13.

The right to join a political party or other organization and to participate in its meetings is guaranteed by the First Amendment and the due process clause of the Fourteenth. *DeJonge* v. *Oregon*, 299 U. S. 353. Government

employees are not stripped of constitutional right by virtue of their employment. *Wieman* v. *Updegraff*, *supra*, at 191-2.

The power of the state to suspend these constitutional guarantees depends upon actual necessity. *American Communications Association* v. *Douds*, 339 U. S. 382; *Herndon* v. *Lowry*, 301 U. S. 242, 258. There was no national emergency in 1954, a year after the end of the Korean War, which rationally could justify the summary discharge of a subway conductor for political reasons.

A subway conductor, whose duty it is to open and close subway doors, does not engage in work "necessary to the security or defense of the nation and the state" and does not handle "confidential information" relating thereto (§ 2). The designation of the New York City Transit Authority as a "security agency", thereby making every job in it a security position regardless of its nature (cf. *Cole* v. *Young*, 351 U. S. 536; Fuld, J., at Appendix, p. 43, ftn. 2), was a highly improper circumvention of the statutory standard. Such a designation is not an adequate substitute for the actual necessity required to suspend the right of free political association guaranteed by the Fourteenth Amendment.*

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* The currency and seriousness of the problem is indicated by the State Civil Service Commission's inclusion of paleontologists, probation officers and street cleaners in security positons or agencies. *Interim Report*, *supra*, p. 2, and by another agency's imposition of loyalty tests for fishing permits. N. Y. Times, May 7, 1957, p. 37.

More recently the Commission made a *volte face* in another case rendering meaningless the designation of an agency as a security agency by ruling that such designation did not affect every position in it (*Matter of the Appeal of Miriam Reif* (1957) [unreported]).

(3) The statute impaired appellant's constitutional privilege against self-incrimination under the Fifth Amendment and his privileges and immunities under the Fourteenth.

The Security Risk Law was passed in aid of the federal government's national security program (§1). Governor Dewey's approving memorandum described the bill as "a temporary measure designed to insure the greatest possible cooperation of state agencies with federal agencies in providing for the defense of this country and supporting its policies in foreign affairs." (Governor's Memorandum, Unconsolidated Laws, §§ 1101 *et seq.* pocket part, p. 29).

The statute authorizes the Civil Service Commission (a) to accept under certain circumstances the United States Attorney-General's findings as to the subversive character of organizations (§ 8), and (b) to enter into contracts with the federal authorities "for the supplying of * * * assistance necessary for the performance of its duties pursuant to this act" (§ 9).

The Deputy Commissioner of Investigation acted as an agent of the federal government when he examined appellant under this law relating to "the national welfare, safety and security" (Appendix, p. 1). Relevant information given the state in this loyalty-security area would undoubtedly be transmitted to the F.B.I. (see, e. g., *Commonwealth of Pennsylvania* v. *Nelson*, 350 U. S. 497, 506, 519, ftn. 10). Appellant's rights against the agent could not be less than those against the principal.

The situation here is analogous to that in *Gambino* v. *U. S.*, 275 U. S. 310, 319, where the "peculiar relation borne in New York * * * by state officers to federal prohibition enforcement" led to reversal of a federal conviction based upon evidence unlawfully seized by state officials.

Appellant's right to assert his constitutional privilege in an essentially federal proceeding with respect

to federal crime is a privilege of national citizenship. His dismissal abridged such privileges and immunities since they "arise out of the nature and essential character of the national government" (*Twining* v. *New Jersey*, 211 U. S. 78, 97).

This right to assert the *federal* constitutional privilege before a state agency of the federal government has never been the subject of consideration by this Court.* It raises important questions concerning federal-state relations in an area of expanding collaboration.

(4) The construction of the statute and State Constitution denies appellant the equal protection of the laws.

A. Article I, § 6 of the State Constitution provides that one shall not "be compelled in any criminal case to be a witness against himself." This section has been given a broad and liberal construction for many years in the court below in favor of the citizen. *In re Grae* 282 N. Y. 428; *People ex rel. Taylor* v. *Forbes*, 143 N. Y. 219, 227; *Matter of Doyle*, 257 N. Y. 244; *People* v. *Harris*, 294 N. Y. 424; *People* v. *Doyle*, 1 N. Y. 2d 732; *Matter of Kaffenburgh*, 188 N. Y. 49.

The State Constitution authorizes the sanction of discharge only against a grand jury witness refusing to "testify concerning the conduct of his office or the performance of his official duties" (Art. I, § 6); this exception is not applicable here.

The only persons in the State of New York punished under the decisions of the court below for invocation

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* This issue must be distinguished from two related ones: (1) the right to assert the state constitutional privilege in a purely state proceeding because of the possibility of federal incrimination (see *Jack* v. *Kansas*, 199 U. S. 372); and (2) the extent to which the federal constitution protects the assertion of the state privilege where federal incrimination is not involved (see *Adamson* v. *California* 332 U. S. 46).

of the privilege are those involved in these so-called security cases. This was first manifested in the state court's decision in *Daniman* v. *Board of Education*, 306 N. Y. 532, reversed in part, *sub. nom*, *Slochower* v. *Board of Education*, 350 U. S. 551. It is carried farther by the present decision which equates assertion of the privilege with evidence of guilt.

Discrimination against a particular class, whether by judicial interpretation of state statute or constitution, denies equal protection of the laws under the Fourteenth Amendment. *Shelley* v. *Kraemer*, 334 U. S. 1, 14. The discrimination and classification is particularly unreasonable where it is directed against persons accused of political dissidence, the very group intended to be protected by the Fifth Amendment. *Quinn* v. *United States*, *supra*, p. 163, ftn. 31. New York stands alone in its imputation of guilt. Florida has only recently decided otherwise. *Sheiner* v. *Florida*, 82 So. 2d 657, cited in *Konigsberg* v. *State Bar of California*, *supra*, p. 732, ftn. 31.

B. The state court's decision presents two other substantial issues of equal protection: (1) It had previously held that state employees were entitled to a "fair trial", *i.e.*, confrontation and cross-examination, *Matter of Fusco* v. *Moses*, 304 N. Y. 424, 434; *Matter of Greenbaum* v. *Bingham*, 201 N. Y. 343, 347; *People ex rel. Packwood* v. *Riley*, 232 N. Y. 283; (2) It had held that employees could not be discharged except upon "the charge litigated", *Matter of Meyer* v. *Goldwater*, 286 N. Y. 461, 463. The instant decision authorizing summary discharge upon grounds not charged is a radical departure from these standards, thus denying appellant equal protection of the laws.

Respectfully submitted,

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APPENDIX

The Statute

The Security Risk Law of New York, Chapter 233, Laws of 1951, as amended by Chapter 105, Laws of 1954, effective March 15, 1954, read as follows at the time of appellant's suspension and discharge:

"An Act to amend chapter two hundred thirty-three of the laws of nineteen hundred fifty-one, entitled 'An act declaring the existence of a public emergency and authorizing the disqualification of applicants and eligibles for entrance into public service, and the suspension and removal or transfer of officers and employees in the service of the state and its civil divisions, whose appointment or continued employment during the emergency is deemed dangerous to the national welfare, safety and security,' in relation to the adoption by the state civil service commission of designations of subversive organizations made by the United States attorney general or the state board of regents, and by extending its provisions to June thirtieth, nineteen hundred fifty-five."

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Declaration of legislative findings and intent. The legislature hereby finds and declares the existence of a serious public emergency in this state resulting from the following acts and events among others: the mandate of the United Nations to its armed forces, including those of the United States, to repel armed aggression against the government and the people of Korea south of the 38th Parallel; the proclamation by the president of the United States of America declaring the existence of a national emergency and calling for the intensive and con-

centrated mobilization and utilization of the resources and facilities of the nation and for the coordination and direction of state and local activities related to civilian protection and to state and national defense. The legislature also finds that the employment of members of subversive groups and organizations by government presents a grave peril to the national security. These groups and organizations are frequently well organized and rigidly disciplined, and often under the direction and control of a foreign power are dedicated to the task of bringing about the overthrow of existing legally constituted government by any available means, including force if necessary. If members of such organizations and groups and persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the existence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States. In view of this imminent and great danger to our national security, it is vital and essential that measures be taken to effect the disqualification for entrance into and the suspension and removal from security offices and positions in governmental service of persons concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in security positions would endanger the security or defense of the nation and the state. In consequence thereof, the necessity for the enactment of this act and for the operation and effectiveness of its provisions during the period of such emergency, beginning from the date this act takes effect and terminating on the thirtieth day of June, nineteen hundred fifty-two, are hereby declared as a matter of legislative determination.

§ 2. Definitions. (a) The term "security agency" as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available.

(b) The term "security position" as used in this act shall mean (1) any office or position in the public service which requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available.

§ 3. Determination of security agency and security position. Upon its own initiative or whenever requested by the head of any department, bureau, division or other agency of the state government, or by any municipal civil service commission, or board, or body, authorized by law to conduct examinations and certify eligibles for positions in the service of the state or its civil divisions, the state civil service commission shall determine whether or not (1) an agency is a security agency within the meaning of section two(a) of this act, or (2) a position is a security position within the meaning of section two(b) of this act. Such determination by the state civil service commission shall be subject to review by the courts in accordance with the provisions of article seventy-eight of the civil practice act.

§ 4. Disqualification of applicant or eligible. The state civil service commission and each municipal civil service commission or other board or body authorized by law to conduct an examination and certify an eligible for appointment to a security position in governmental service shall

refuse to examine an applicant for, or after examination, to certify an eligible to, such position if it finds, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such applicant or eligible would endanger the security or defense of the nation and the state.

§ 5. Suspension and removal or transfer. Any public officer, board, body or commission of the state or of any civil division thereof authorized by law, rule or regulation to exercise the power of appointment may, in his or its absolute discretion and when deemed necessary in the interests of national security, transfer, subject to the approval of the civil service commission having jurisdiction, to a position other than a security position or to an agency other than a security agency, or suspend without pay any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state. The officer or employee with respect to whom such action was taken shall be notified that such action was taken pursuant to this section and, to the extent possible without disclosing confidential sources of information of law enforcement agencies, or agencies empowered or required by law to investigate subversive activities or disloyalty, the reasons for such action. Within thirty days after such notification, such person shall have an opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty. Following such further investigation and review as he or it shall deem necessary, the officer, board, body or commission taking such action shall affirm

the transfer or terminate the employment of such officer or employee if he or it shall find, that, upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability, the employment of such person in a security position or in a security agency would endanger the security or defense of the nation and the state. If the officer, board, body or commission finds no reason to warrant the transfer or removal of such officer or employee, he shall be restored to his position and if such officer or employee has been suspended from his position, he shall, upon restoration, be entitled to back pay for the period of his suspension.

§ 6. Appeal to state civil service commission. Any person who believes himself aggrieved by a determination of disqualification under the authority of section four of this act and any officer or employee who believes himself aggrieved by a determination of transfer or dismissal under the authority of section five of this act may appeal from such determination by an application in writing to the state civil service commission within twenty days after receiving written notice of such determination. Such commission shall set a time and place for the hearing of such appeal and give due notice thereof to the appellant and to the officer, board, body or commission whose determination is under review. The hearing shall be held by the commission or by a person or persons, not exceeding three, designated by the commission in writing to hear such appeal in its behalf. The Commission, in its discretion, may designate such person or persons to hear and determine said appeal or to hear and report to the commission and, in the latter event, the report shall be acted upon by the entire commission. The persons so designated by the commission may be officers or employees of the civil service of the state. They shall have the power to require amplification of the reasons for the action appealed from and to administer oaths, hold or conduct public or private hearings, subpoena and compel the attendance of witnesses, and the

production of books, papers, records and documents. The person or persons holding such hearing shall make such inquiry as may be deemed advisable, and shall upon the request of the appellant permit him to be represented by an attorney and to present evidence in his behalf. The Commission or the person or persons authorized to hear and determine such appeal may affirm, reverse or modify the findings and determination under review and, in the case of reversal, shall order the reinstatement of the appellant, and if such appellant had been dismissed from his position, he shall, upon restoration, be entitled to back pay from the date of his suspension. The commission may direct the transfer of an appellant to a similar position in another division or department other than a security position or a position in a security agency, or may direct that his name be placed upon a preferred list pursuant to section thirty-one of the civil service law for reinstatement to a position other than a security position or a position in a security agency. The decision of the commission or the person or persons designated by it to hear and determine such appeal shall be final and conclusive and shall not be subject to review in any court.

§ 7. Evidence. In proceedings taken pursuant to this act, evidence shall not be restricted by the rules of evidence and procedure prevailing in the courts. A finding, pursuant to sections four or five of this act, may be based upon evidence of the previous conduct of the applicant, eligible, officer, or employee, as the case may be, which may include to the extent deemed appropriate, but shall not be limited to evidence of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership

in any organization or group found by the state civil service commission to be subversive.

§ 8. Subversive groups and organizations. As used in this act, a subversive group or organization shall be one which is found by the state civil service commission, after inquiry, and after such notice and hearing as may be appropriate, to advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or to advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law. The commission, in making such inquiry, may utilize any listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, or by the state board of regents, and for the purposes of such inquiry the commission may request and receive from said federal agencies or authorities or state board of regents, any supporting material or evidence that may be made available to it. Where any organization or group has been so designated by the United States attorney general pursuant to executive order number ten thousand four hundred fifty, of April twenty-seventh, nineteen hundred fifty-three or any executive orders or regulations amendatory or supplemental thereto, or by the state board of regents pursuant to section three thousand twenty-two of the education law, or any acts amendatory or supplemental thereto, the state civil service commission may adopt such designation for the purposes of this act, provided such designation by the United States attorney general or the state board of regents was made after due notice to such organization or group and an opportunity afforded it to answer.

§ 9. To the extent of appropriations available therefor, the civil service commission is authorized to enter into contract with the federal bureau of investigation, the United

States department of justice, or any other appropriate public agency for the supplying of information in making investigations, or any other assistance necessary for the performance of its duties pursuant to this act.

§ 10. The provisions of this act shall be controlling notwithstanding the provisions of any other general, special or local law.

§ 11. The provisions of this act shall remain in effect until June thirtieth, nineteen hundred fifty-five.

§ 12. This act shall take effect immediately.

Since its original passage in 1951, the statute has been extended six times for additional one year periods. L. 1952, c. 46; L. 1953, c. 26; L. 1954, c. 105; L. 1955, c. 156; L. 1956, c. 310; L. 1957, c. 176. No changes were made in its text except for an amendent to § 6 in 1953 to permit representation by counsel. L. 1953, c. 26, and an amendment in 1954 adding the last sentence to § 8. L. 1954, c. 105.

Opinion of Court of Appeals

(Decided February 28, 1957.)

In the Matter of

MAX LERNER,

Appellant,

against

HUGH J. CASEY *et al.*, Constituting the NEW YORK CITY TRANSIT AUTHORITY,

Respondents.

APPEAL from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered June 25, 1956, affirming, by a divided court, an order of the Supreme Court at Special Term (BENJAMIN BRENNER, J.), entered in Kings County, granting a motion by respondents to dismiss the petition, and dismissing the petition and the proceeding.

CONWAY, *Ch. J.* We are here concerned with the question of whether petitioner is entitled to an order reinstating him to the position of subway conductor in the New York City Transit System. He has been discharged from such position by the respondents, constituting the New York City Transit Authority, upon the ground that a reasonable basis exists for the belief that, because of his doubtful trust and reliability, his employment in the position of conductor endangers the security or defense of the nation and the State.

On September 14, 1954, pursuant to instructions received from his immediate superior, petitioner appeared at the office of the commissioner of investigation of the

City of New York for the purpose of answering questions in an investigation being conducted by the commissioner. After he was sworn, petitioner was asked whether he was then a member of the Communist party. He refused to answer upon the ground that to do so might tend to incriminate him and that, therefore, he was entitled to claim the privilege against self-incrimination afforded him under the Fifth Amendment to the United States Constitution.

After being advised of the provisions of the Security Risk Law (L. 1951, ch. 233, as amd.) and being given an opportunity to reconsider his refusal, he reappeared at the office of the Department of Investigation on September 21, 1954, at which time he requested additional time to engage counsel. On September 30, 1954 he appeared, accompanied by counsel who requested and was granted a further adjournment. On October 8, 1954 petitioner again appeared with counsel and once more refused to answer questions as to whether he was then or had been a member of the Communist party.

The foregoing facts were brought to the attention of the Transit Authority. Thereafter, on October 21, 1954, the Authority adopted a resolution suspending petitioner, without pay, effective at the close of business on October 22, 1954. The resolution was sent to the petitioner with a covering letter. Both the letter and the resolution recited the reasons for the action taken and both notified the petitioner that he had the opportunity, within 30 days after notification, to submit statements or affidavits to demonstrate why he should be reinstated or restored to duty.

By report dated November 22, 1954, the executive director and general manager notified the Authority that, during the 30-day period allowed him, neither petitioner, nor anyone on his behalf, had communicated with the Authority or the Department of Investigation of the City of New York, and that further investigation had revealed activities on the part of the petitioner which gave reasonable grounds for belief that he was not a good security risk. The Author-

ity then found, upon review, that, upon all the evidence, reasonable grounds existed for the belief that because of his doubtful trust and reliability, the employment of petitioner in the position of conductor endangered the security or defense of the nation and the State. Accordingly, the employment of petitioner was terminated at the close of business on November 24, 1954.

The Security Risk Law, under which petitioner was discharged, was adopted in 1951 and has been extended so that its terminal date now is June 30, 1957 (L. 1956, ch. 310), unless extended again.

It will be helpful if we here summarize the various sections of the Security Risk Law.

The first section—section 1—is the declaration of the Legislature's findings and intent. It states, in part, that the Legislature "* * * finds that the employment of members of subversive groups and organizations by government presents a grave peril to the national security. These groups and organizations are frequently well organized and rigidly disciplined, and often under the direction and control of a foreign power are dedicated to the task of bringing about the overthrow of existing legally constituted government by any available means, including force if necessary. If members of such organizations * * * concerning whom reasonable grounds exist for the belief that, because of doubtful trust and reliability, their employment in public service in security positions would endanger the security or defense of the nation and the state, are permitted to hold public office and employment, their retention in security positions during the existence of a national emergency would imperil or endanger the safety, welfare or best interests of the armed forces, the civilian defense forces and the people of this state and of the United States. * * *"

Section 5 provides for the suspension and removal or transfer of an employee under the statute. The provision conferring this authority is as follows: "Any public officer,

board, body or commission of the state or of any civil division thereof authorized by law, rule or regulation to exercise the power of appointment may, in his or its absolute discretion and when deemed necessary in the interests of national security, transfer, subject to the approval of the civil service commission having jurisdiction, to a position other than a security position or to an agency other than a security agency, or suspend without pay any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or defense of the nation and the state."

Section 4 contains the provisions as to disqualification of applicants or eligibles.

The balance of the suspension and dismissal section (§ 5) contains the provisions for notification to the employee of the action taken and of the steps he may then take. They are as follows: "The officer or employee with respect to whom such action was taken shall be notified that such action was taken pursuant to this section and, to the extent possible without disclosing confidential sources of information of law enforcement agencies, or agencies empowered or required by law to investigate subversive activities or disloyalty, the reasons for such action. Within thirty days after such notification, such person shall have an opportunity to submit statements or affidavits to show why he should be reinstated or restored to duty. Following such further investigation and review as he or it shall deem necessary, the officer, board, body or commission taking such action shall affirm the transfer or terminate the employment of such officer or employee if he or it shall find, that, upon all the evidence, reasonable grounds exist for the belief that, because of doubtful trust and reliability, the

employment of such person in a security position or in a security agency would endanger the security or defense of the nation and the state. If the officer, board, body or commission finds no reason to warrant the transfer or removal of such officer or employee, he shall be restored to his position and if such officer or employee has been suspended from his position, he shall, upon restoration, be entitled to back pay for the period of his suspension."

Section 6 provides for appeal to the State Civil Service Commission by any person who believes himself aggrieved by a determination under sections 4 or 5, and the proceedings to be had upon such appeal.

Section 7 deals with evidence which may be considered in proceedings under the act. It declares that finding of disqualification (under § 4) and a determination of suspension, removal or transfer from the position (under § 5) may be based upon evidence of previous conduct, which may include "to the extent deemed appropriate, but shall not be limited to evidence of" four forms of conduct. One of these is "membership in any organization or group found by the state civil service commission to be subversive."

Section 8 provides that a subversive group or organization, as used in the law, shall be one found by the State Civil Service Commission, after inquiry and appropriate notice and hearing, to advocate the overthrow of the government by force and violence, or so designated by the United States Attorney General or by the State Board of Regents pursuant to the Feinberg Law (Education Law, § 3022), provided these designations were made upon notice to the organization or group and opportunity afforded to answer.

Section 2 defines "security agency" as meaning: "• • • any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available."

The section defines "security position" as: "* * * (1) any office or position in the public service which requires the performance of functions which are necessary to the security or defense of the nation and the state; or (2) any office or position in any public agency or department where confidential information relating to the security or defense of the nation and the state may be available."

Section 3 provides how it shall be determined what is a security agency or security position: "Upon its own initiative or whenever requested by the head of any department, bureau, division or other agency of the state government, or by any municipal civil service commission, or board, or body, authorized by law to conduct examinations and certify eligibles for positions in the service of the state or its civil divisions, the state civil service commission shall determine whether or not (1) an agency is a security agency within the meaning of section two (a) of this act, or (2) a position is a security position within the meaning of section two (b) of this act. Such determination by the state civil service commission shall be subject to review by the courts in accordance with the provisions of article seventy-eight of the civil practice act."

On November 23, 1953 the State Civil Service Commission declared the New York City Transit Authority to be a security agency within the meaning of the Security Risk Law. On March 24, 1954 by resolution the commission listed the Communist party of the United States and of the State of New York as subversive within the meaning of the Security Risk Law. This was based upon and was an adoption of such listing of the Communist party by the State Board of Regents under the Feinberg Law.

The facts as to petitioner's discharge under the Security Risk Law have been set forth above.

On this appeal the following basic questions are presented:

(1) Whether the New York City Transit Authority is a "board, body or commission of the state or of any civil

division thereof" within the intendment of the Security Risk Law and whether the city commission of investigation had jurisdiction to conduct the inquiry;

(2) Assuming that the answer to (1) be in the affirmative, whether the Transit Authority was properly designated a "security agency";

(3) Assuming that the answer to (2) be also in the affirmative, whether the Security Risk Law authorizes the Transit Authority to suspend and discharge one occupying the position of subway conductor in such security agency merely upon a showing that, when asked if he was *then* a member of the Communist party, he refused to answer, and then gave as a reason for so refusing, that to answer might tend to incriminate him within the meaning of the Constitution, and

(4) Assuming that the answer to (3) be also in the affirmative, whether the Security Risk Law is constitutional.

We shall treat of the questions seriatim.

The New York City Transit Authority was created by the Legislature as a "body corporate and politic constituting a public benefit corporation". (Public Authorities Law, § 1801, subd. 1.) It operates the transit facilities owned by the City of New York. It is comprised of three members, one of whom is appointed by the Mayor of the City of New York, one by the Governor of the State and the third member (who shall be chairman of the board) appointed by the first two members after their appointment and qualification. Neither the chairman nor any member shall hold any other paid public office or employment under the Government of the United States, of the State of New York or of the City of New York. The Authority performs the vital function previously vested in the Board of Transportation of the City of New York, which was a city agency and eligible to be declared a security agency.

It is clear that the danger to government to be anticipated from the activities of a subversive individual in the employ of the Transit Authority is no different from the danger to government to be anticipated from such individual if he were still in the employ of its predecessor body, the Board of Transportation. We think it also clear that the purpose of the Legislature in enacting the Security Risk Law was to protect the government and those public authorities performing vital functions of government from the peril of infiltration of subversive individuals into the public service. Accordingly, in our judgment, the Transit Authority is a "board, body or commission of the state or of any civil division thereof" within the intendment of the Security Risk Law.

The petitioner argues that the city's interest in the transit system is that of lessor of the physical properties only, and that such interest does not justify its interrogation of employees of the Transit Authority. We do not agree.

The City of New York is empowered, through the commissioner of investigation, to investigate and inquire into all matters of concern to the city or its inhabitants (see General City Law, § 20, subd. 21; § 23, subd. 1; New York City Charter, § 803). As we have said, the City of New York owns the rapid transit facilities which constitute the New York City Transit System. In June of 1953 those facilities were leased by the city to the Transit Authority for a period of 10 years. Under the lease the city is required to pay the costs of the capital improvements on the transit system and, so, the city has a proprietary interest in preserving and protecting those facilities from sabotage or destruction. Moreover, it cannot be doubted that the very existence of the city is dependent upon the safe and uninterrupted operation of the transit system. Certainly, an investigation to determine whether employees of the transit system are members of subversive organizations or are of doubtful trust and reliability is "in the

best interests of the city" (New York City Charter § 803, subd. 2). That being so, the investigation here involved was properly initiated by the commissioner of investigation (see *Matter of Cherkis* v. *Impellitteri*, 307 N. Y. 132, 148).

The Public Authorities Law confers upon the Transit Authority the right to avail itself of the services of the officers and agencies of the city government (see Public Authorities Law, § 1803, subd. 3, par. b). The Authority must be said to have exercised its right to make use of the services of the commissioner of investigation and, in effect, to have authorized said commissioner to conduct the investigation on its behalf, when it directed the petitioner to appear before the commissioner to answer questions designed to ascertain whether he was of doubtful trust and reliability. Under the Security Risk Law the Authority is not required to make its determination upon evidence developed as a result of its own investigation—it has the right to consider and weigh evidence from any source.

We turn now to the question of whether the Transit Authority was properly designated a "security agency."

The law defines the term "security agency" as follows: "(a) The term 'security agency' as used in this act shall mean any department, bureau, agency, office or unit of government (1) wherein functions are performed which are necessary to the security or defense of the nation and the state; or (2) where confidential information relating to the security or defense of the nation and the state may be available."

The Transit Authority performs a function necessary to the security or defense of the nation and the state. This fact was vividly demonstrated recently when certain New York City subway motormen went out on strike. Mr. Justice Lupiano, Special Term, New York County, in issuing an injunction against those motormen, aptly pointed out (*New York City Tr. Auth.* v. *Loos*, 2 Misc 2d 733, 738):

"It is easy to forget, while the subways are running, that there is room for motor vehicles on the streets only because millions travel by subway; for if all persons had to use surface transportation, the bridges and tunnels and main highways would soon be hopelessly clogged. New York with its immense territory and its five separate boroughs, all protected by unified police and fire departments and having many other integrated services, is dependent for its very life and daily functioning, and for the immediate safety of its 8,000,000 inhabitants, on rapid transit facilities which are necessarily used by nearly all persons engaged in all of its governmental and other vital functions. Whatever may be the case elsewhere, and under other conditions, whatever may have been the case in other times, here and now, and for this city, the operation of the rapid transit facilities is a basic governmental service indispensable to the conduct of all other governmental as well as private activities necessary for the public welfare. It is worth re-emphasizing that the subways are the city's arteries upon which its life and daily living depend. * * *"

We consider it clear, therefore, that the Transit Authority has been properly denominated a "security agency".

The Appellate Division, in concluding that the petitioner's refusal to answer the question posed constituted sufficient justification for his dismissal under the Security Risk Law, wrote:

"We apprehend that if a statute, such as the Los Angeles ordinance * permitting discharge of a public em-

* In *Garner* v. *Los Angeles Bd.* (341 U. S. 716), the Supreme Court of the United States upheld an ordinance of the City of Los Angeles which required every employee to execute an affidavit, stating whether or not he was or ever had been a member of the Communist party or the Communist Political Association. Mr. Justice Clark, writing for the court, said (p. 720):

"The affidavit raises the issue whether the City of Los Angeles is constitutionally forbidden to require that its employees disclose their past or present membership in the Communist Party or the Communist Political Association. Not before us

ployee for refusal to execute an affidavit of the character there required, is valid and justifies his discharge for that reason, it is proper for a security agency, charged with the duty of determining whether an employee is of doubtful trust and reliability from a security standpoint, to inquire into those matters and, if the employee refuses to answer, it may not be said that the agency is not empowered to find that such refusal, in and of itself, furnishes reasonable grounds for a belief that he is not a good security risk. It is our view that the correct construction has been placed on the Security Risk Law by the Transit Authority and by the Special Term."

Petitioner contends that the Legislature in enacting the Security Risk Law intended that a security risk agency must have a hearing at which it introduces evidence against the employee before it may find the employee to be a security risk and that it may not discharge the employee for mere failure to answer the question as to Communist party membership. The respondents, on the other hand, contend that the refusal to reply to the crucial question as to Communist party membership is "evidence" of "doubtful trust and reliability", which is the ground for discharge under the Security Risk Law. They point out that the petitioner was not discharged on the ground that he was a Communist party member. He was discharged

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is the question whether the city may determine that an employee's disclosure of such political affiliation justifies his discharge.

"We think that a municipal employer is not disabled because it is an agency of the State from inquiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment. The affidavit requirement is valid."

This reasoning, it seems to us, is determinative of the case presently before us.

for having created a doubt by declining to answer whether he was or was not a member.

We agree with the respondents.

It seems to us that it would be more clear if we suppositiously divided the conduct of petitioner into two parts. The first, when he was asked by his employer whether he was then a member of the Communist party. That question he refused to answer. He then left the room. Certainly by that conduct he would have given evidence of his own untrustworthiness and unreliability. Suppose then, as the second part of his conduct, he returned five minutes later and told the commissioner of investigation that he had refused to answer his question because to do so might tend to incriminate him. May not the employer discharge an employee who refuses to answer his proper question? If the petitioner, in the case supposed, had not returned to the commissioner five minutes later and given a reason for his conduct, we think all would agree that he was properly discharged. Does it change the situation because he returns to say that he refused to answer because to do so might tend to incriminate him? Does that explanation destroy the evidence which he has given to his employer of his untrustworthiness and unreliability as a security risk? Does the explanation *require* that the employer consider without any doubt that the employee by his explanation has again become trustworthy and reliable as a security risk as a matter of law? We think not.

The intent of the Security Risk Law was to set up a removal procedure which would provide a more ready means of removing security risks from public service than sections 22 or 12-a of the Civil Service Law. This is apparent from the fact that even under the Civil Service Law an employee, refusing to answer questions put to him by his employer pertaining to his official conduct, may be removed, after a hearing, under a charge of insubordination without any showing by the employer of the information which prompted the inquiry.

The contentions of the petitioner (1) that the Security Risk Law is unconstitutional because an emergency no longer existed in 1954 when the petitioner was dismissed since the Korean War had ended and (2) no emergency could conceivably justify the dismissal of the petitioner because his position as a conductor could have no rational connection with national security, are untenable.

As to (1) all that need be said is that the wisdom of the Legislature in extending the Security Risk Law beyond the period of the Korean War has been confirmed by world events transpiring since the Korean Truce.

As to (2) we are in accord with respondents that the importance of the petitioner's position to the security of the State and of the City of New York can be readily seen when it is considered that in modern warfare the civilian population may well be a prime target. A bombing raid on New York City would undoubtedly be planned for a time when the maximum number of people would be in the city. The most important facility for the evacuation of the people would be the subway system. If the petitioner were a member of the Communist conspiracy he would, as an employee of the transit system in charge of a train, as conductors are, be a very real threat to the security of the State and of the city.

It may be argued that one conductor can do very little harm. The answer to that argument, however, is to be found in the words of Mr. Justice Jackson in his concurring opinion in *Dennis* v. *United States* (341 U. S. 494, 564): "The Communist Party, nevertheless, does not seek its strength primarily in numbers. Its aim is a relatively small party whose strength is in selected, dedicated, indoctrinated, and rigidly disciplined members. From established policy it tolerates no deviation and no debate. It seeks members that are, or may be, secreted in strategic posts in *transportation*, communications, industry, government, and especially in labor unions where it can compel employers to accept and retain its members. It also seeks

to infiltrate and control organizations of professional and other groups. Through these placements in positions of power it seeks a leverage over society that will make up in power of coercion what it lacks in power of persuasion." (Emphasis supplied.)

The final question pertains to the constitutionality of the Security Risk Law, as thus construed and applied to petitioner.

The petitioner contends that the case of *Slochower* v. *Board of Educ.* (350 U. S. 551) is controlling authority for the proposition that the Security Risk Law, as so construed, is unconstitutional.

In distinguishing the *Slochower* case, the majority of the Appellate Division concluded that the holding there was merely that a teacher in a city college, entitled to tenure, and who could be discharged only for cause and after notice, hearing, and appeal, could not be mandatorily and summarily dismissed *solely* on the ground that he invoked the protection of the Fifth Amendment before a Congressional committee conducting an inquiry not directed at the property, affairs, or government of the city or the official conduct of city employees. In further distinguishing the *Slochower* case, the Appellate Division said, in part: "• • • We apprehend that in view of the manner in which the court stressed the 'remoteness of the period to which they [the questions] are directed,' the failure of the statute to provide an opportunity to explain the reason for refusal to answer and, more particularly, the nature of the inquiry being conducted by the Federal committee, that decision must be strictly limited to its own peculiar facts. The reference to the *Garner* case is some indication that, had Professor Slochower's refusal to answer occurred before a duly constituted body investigating the affairs of the board of higher education or of Brooklyn College, a different result would have been reached even under section 903 of the charter."

We believe that the Appellate Division has properly distinguished the *Slochower* case (*supra*) from the present case. In that case the majority of the Supreme Court said (350 U. S. 551, 558):

"As interpreted and applied by the state courts, it [New York City Charter, § 903] operates to discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge. No consideration is given to such factors as the subject matter of the questions, remoteness of the period to which they are directed, or justification for exercise of the privilege. It matters not whether the plea resulted from mistake, inadvertence or legal advice conscientiously given, whether wisely or unwisely. The heavy hand of the statute falls alike on all who exercise their constitutional privilege, the full enjoyment of which every person is entitled to receive. Such action falls squarely within the prohibition of *Wieman* v. *Updegraff*, *supra*.

"It is one thing for the city authorities themselves to inquire into Slochower's fitness, but quite another for his discharge to be based entirely on events occurring before a federal committee whose inquiry was announced as not directed at 'the property, affairs, or government of the city, or * * * official conduct of city employees.' In this respect the present case differs materially from *Garner*, where the city was attempting to elicit information necessary to determine the qualifications of its employees. Here, the Board had possessed the pertinent information for 12 years, and the questions which Professor Slochower refused to answer were admittedly asked for a purpose wholly unrelated to his college functions. On such a record the Board cannot claim that its action was part of a bona fide attempt to gain needed and relevant information."

Here, the city was conducting an investigation to determine whether any employees of the Transit Authority were of doubtful trust and reliability; such investigation was

properly instituted in the best interests of the city; the question asked was not remote, it was as to petitioner's *then* membership in the Communist party—a continuing conspiracy against our form of government; no inference of membership in that party was drawn from petitioner's refusal to reply to the question asked and, finally, the petitioner was given an opportunity to explain why he had chosen not to answer the question. Petitioner was not discharged for invoking the Fifth Amendment; he was discharged for creating a doubt as to his trustworthiness and reliability by refusing to answer the question as to Communist party membership.

In the *Slochower* case it was the plea of the Fifth Amendment, *and that alone*, causing automatic dismissal which the Supreme Court condemned. The Security Risk Law does not so operate. When the employee refuses to tell his employer whether he is a member of the Communist party, surely he is giving evidence of "reasonable grounds" for doubt as to whether, as Mr. Justice BRENNER said in the Special Term opinion, he "might be" a member; he is giving "reasonable grounds" for "doubt" about his trustworthiness and reliability as a security risk. If, in refusing, the employee injects his claim of privilege under the Fifth Amendment, that circumstance is incidental or additional. The dismissal is still proper for refusing that vital, fundamental information. Were that not so, this would be the result: An employee may be dismissed for refusing to give information as to whether or not he is a Communist party member (*Garner v. Los Angeles Bd., supra*), but if with his refusal he draws into or adds to his words of refusal a claim that to answer might tend to incriminate him and he, therefore, claims the privilege to refuse to answer under the Fifth Amendment to the United States Constitution, he may not be dismissed. That cannot be.

The petitioner also argues that he asserted his constitutional privilege with respect to a Federal crime and as a part of his national citizenship so that his dismissal abridged his privileges and immunities as a citizen of the United States. It seems to me that such an argument is untenable in a situation such as this where the employee uses the privilege to thwart his employer in ascertaining whether or not he is a member of a criminal conspiracy. In the *Slochower* case (*supra*), as we have pointed out, the Supreme Court indicated that when the questions are asked by the city the employee has an obligation to answer.

The order of the Appellate Division should be affirmed, with costs.

FULD, J. (dissenting). While I am not unmindful of the public interest to be served by ridding government of the subversive and the security risk, I cannot join in the court's decision, for, in my view, the appellant's discharge from his job of subway conductor was effected in disregard of the applicable statute and in violation of constitutional right.

The Security Risk Law was enacted in 1951, as a temporary emergency measure (L. 1951, ch. 233), in response to the Communist aggression in Korea the year before (§ 1). In substance, it authorizes "Any public officer, board, body or commission of the state or of any civil division thereof" to discharge or suspend "any officer or employee under his or its appointive jurisdiction occupying a security position or a position in a security agency, whenever such officer, board, body or commission shall find, after proper investigation and inquiry, that, upon all the evidence, reasonable grounds exist for belief that, because of doubtful trust and reliability, the employment of such person in such position would endanger the security or

defense of the nation and the state" (§ 5).[1] A "security agency" is defined as any agency or unit of government where "functions are performed which are necessary to the security or defense of the nation and the state" or where "confidential information relating to the security or defense of the nation and the state may be available." A "security position" is a post in the public service "which requires the performance of functions which are necessary to the security or defense of the nation and the state" or one in any public agency or department "where confidential information relating to the security or defense of the nation and the state may be available" (§ 2). To the State Civil Service Commission is delegated the authority of determining whether an agency is a security agency or whether a job is a security position within the meaning of the statute (§ 3).

It is open to grave doubt that the New York City Transit Authority, set up as a "body corporate and politic constituting a public benefit corporation" (Public Authorities Law, § 1801, subd. 1), may be regarded as an agency "of the state or of any civil division thereof" within the ambit of the act before us (Security Risk Law, § 5). It is likewise dubious that the Transit Authority may correctly be labeled a "security agency" within the statute's definition (§ 2, subd. [a]). However, I put these troublesome doubts to one side, since I am thoroughly persuaded that, in any

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[1] Another provision recites that the finding required by section 5 "may be based upon *evidence* of the previous conduct of the * * * officer, or employee * * * which may include to the extent deemed appropriate, but shall not be limited to *evidence* of (a) previous unauthorized disclosure of confidential information; (b) the commission or attempt to commit an act or acts designed to or tending to undermine, sabotage, hamper or obstruct a program adopted by the agency or department by which he is employed or which affects the security or defense of the nation and the state; (c) treasonable or seditious conduct; and (d) membership in any organization or group found by the state civil service commission to be subversive" (§ 7, emphasis supplied).

event, the Security Risk Law may not be stretched, under the circumstances of this case, to reach the appellant whose duties are to open and close the doors of subway trains.

Parlous though the times, the anticipation of risks to "the security or defense of the nation and the state" (§ 5) from a person in the appellant's position strikes me as a submission to unreasoning fear rather than a rational basis for administrative action. (Cf. *Cole* v. *Young*, 351 U. S. 536; *Matter of Pinggera* v. *Municipal Civil Service Comm.*, 206 Misc. 615.) The job of opening and closing the doors of a subway train is hardly one of the "strategic posts in transportation" to which Mr. Justice JACKSON adverted in *Dennis* v. *United States*, 341 U. S. 494, 564 (see opinion of CONWAY, Ch. J., *ante*, p. 370). Of course, all men possess a capacity to do injury, but, to pose a risk to security or defense, one's potential for harm must be greater, more distinctive, than this appellant's; no less danger or risk is to be anticipated from any one of the millions of persons who periodically ride the subways as passengers.[2]

However, even if the statute were to be held to apply to the appellant, his dismissal cannot be sustained without violating his right to due process of law under both state

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[2] It should, of course, be noted that in appellant's case the statute's careful definition and examples of a "security position" have been entirely ignored. It is argued that they are irrelevant because the State Civil Service Commission has denominated the Authority a "security agency", thereby converting its every post into a "security position", but I find no justification in the statute for such action. (Cf. *Cole* v. *Young*, *supra*, 351 U. S. 536.)

Indeed, the record tells us nothing of the steps taken by the commission in reaching its determination. Moreover, we are left completely in the dark as to whether the appellant or others affected were notified that the matter was under consideration, or even that the determination had been made. (Security Risk Law, §§ 2, 3; cf. *Anti-Fascist Comm.* v. *McGrath*, 341 U. S. 123, 165 *et seq.*, per Frankfurter, J., concurring.) We are not even told where the determination of the commission is to be found or whether any opportunity was afforded for the prescribed judicial review (§§ 3, 4; cf. *Adler* v. *Board of Educ.*, 342 U. S. 485, 490).

and federal constitutions (N. Y. Const., art. 1, § 6; U. S. Const., 14th Amdt.).[3]

The statute, as noted, requires a finding based "upon * * * evidence" that, "because of doubtful trust and reliability, the employment of [the] person * * * [in question] would endanger the security or defense of the nation and the state" (§ 5). The only "evidence" in support of the Transit Authority's finding "of [appellant's] doubtful trust and reliability" consisted of his refusal, on the basis of the constitutional privilege against self-incrimination, to answer questions put to him by the city commissioner of investigation relating to membership in the Communist party. Apart from his constitutionally protected silence, there was not the slightest evidence or predicate in the record for any inference that he was a member of that organization, that he was of doubtful trust or reliability or that his continued employment would prove dangerous to state or nation.

It is important at the outset to observe that we have here no question whether the state could with propriety, by a clearly worded statute, impose an absolute duty upon public officers or employees to answer questions relating to their official conduct as a condition of continued employment. (See New York City Charter, § 903; N. Y. Const., art. 1, § 6; cf. *Garner* v. *Los Angeles Bd.*, 341 U. S. 716.) The statute before us, essentially different, imposes no such condition. Instead, it authorizes dismissal only upon "evidence" that the particular officer or employee is of such "doubtful trust and reliability" as to endanger the "security" or "defense" of the nation and the state. The narrow issue here presented, therefore, is whether the appellant's exercise of his constitutional right

[3] In the view thus taken, I have no occasion to consider the appellant's further reliance upon the privileges and immunities clause of the Fourteenth Amendment—though I am inclined to agree with the court's conclusion that that clause is not here applicable. (Cf. *Adamson* v. *California*, 332 U. S. 46; *Slochower* v. *Board of Educ.*, 350 U. S. 551, 555.)

to remain mute may serve as the basis for inferring the existence of the facts prescribed by the statute as a condition of discharge.

Slochower v. *Board of Educ.* (350 U. S. 551), though concerned with a different statute and a somewhat different situation, seems to me decisive that such an inference may not be drawn from the mere assertion of the privilege. The Supreme Court there held, and in unmistakable terms announced, that an imputation of guilt from the claim of privilege would constitute "arbitrary action" violative of the "very essence of due process" (p. 559).

Firmly established as "one of the great landmarks in man's struggle to make himself civilized" (Griswold, The Fifth Amendment Today [1955], p. 7), the privilege against self-incrimination stands as a bulwark for the protection of persons accused, as well as of witnesses, who, though entirely innocent of any wrongdoing, may have a reasonable and honest fear of prosecution. Recognition of this fundamental right demands that it be freely exercisable without undue restraint or invidious consequences. As the Supreme Court declared in *Slochower* (350 U. S., at p. 557):

> "At the outset we must condemn the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment. The right of an accused person to refuse to testify, which had been in England merely a rule of evidence, was so important to our forefathers that they raised it to the dignity of a constitutional enactment, and it has been recognized as 'one of the most valuable prerogatives of the citizen.' *Brown* v. *Walker*, 161 U. S. 591, 610. We have reaffirmed our faith in this principle recently in *Quinn* v. *United States*, 349 U. S. 155. In *Ullmann* v. *United States*, 350 U. S. 422, decided last month, we scored the assumption that those who claim this privilege are either criminals or perjurers. The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury."

It is urged that the *Slochower* decision is not in point, since the Supreme Court itself there noted that the case involved the assertion of the privilege in an investigation conducted by a "federal committee" rather than by "city authorities" (p. 558). That observation, however, in no way operated to lessen the force either of the Supreme Court's sweeping condemnation of "the practice of imputing a sinister meaning to the exercise of a person's constitutional right under the Fifth Amendment", or of the court's solemn affirmation that that right "would be reduced to a hollow mockery if its exercise" could be twisted into a confession of guilt or disloyalty.

Yet that is precisely the vice of what was done in this case. It is contended that a public officer or employee, unlike the general citizenry, may properly be found to be at least "of doubtful trust and reliability," if not actually disloyal, where he claims his right to refuse to answer questions relating to his possible association with a subversive organization. Whether, however, the refusal be taken as an admission of his membership in such organization, or merely as engendering a doubt as to his reliability, the fact remains that in either instance an adverse, "sinister" inference, fraught with serious consequences, is attempted to be drawn from the invocation of the constitutional privilege. Based as it was solely upon his exercise of the privilege, the appellant's discharge constitutes "arbitrary action" within *Slochower*, regardless of the formal difference in the labels employed. Any other conclusion would be strange indeed: to treat reliance upon a fundamental constitutional guarantee as proof of "untrustworthiness and unreliability" is anomalous, a veritable contradiction in terms.

The point is made that appellant should have availed himself of the opportunity afforded by the statute of submitting statements or affidavits "to show why he should be reinstated or restored to duty" (Security Risk Law, § 5). As I read the record before us, the "opportunity" was

illusory, a Hobson's choice. His alternatives were either to repeat his reliance upon the constitution or to forego that right, to reassert his privilege or to capitulate and answer the question. His failure to make the choice is, consequently, irrelevant.

There is ever a need to achieve a balance between government security and the traditional rights of the individual. That balance has been destroyed by the way in which the statute before us has been applied. It is a delusion to think that the nation's security is advanced by the sacrifice of the individual's basic liberties. The fears and doubts of the moment may loom large, but we lose more than we gain if we counter with a resort to alien procedures or with a denial of essential constitutional guarantees. "Historic liberties and privileges," this court declared some twenty-five years ago (*Matter of Doyle*, 257 N. Y. 244, 268), "are not to bend from day to day 'because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment' (HOLMES, J., in *Northern Securities Co. v. United States*, 193 U. S. 197, 400), are not to change their form and content in response to the 'hydraulic pressure' (HOLMES, J., *supra*) exerted by great causes."

I would reverse the orders of the courts below.

VAN VOORHIS, J. (concurring in part with FULD, J.). In my view this was a "sensitive" employment, but petitioner was discharged upon the sole ground specified in the Security Risk Law, viz., that he was a bad security risk; in the legislative language, that his retention in this position "would endanger the security or defense of the nation and the state" (L. 1951, ch. 233, § 5, as extended). He was not charged with insubordination in refusing to answer questions relating to matters that might affect his qualifications for his work by reason of past or present affiliations. He was discharged upon an affirmative finding of fact that he was a bad security risk, of which there

was no evidence except that he had invoked the Fifth Amendment. I concur in the part of Judge FULD's opinion in which he reasons that invoking the Fifth Amendment does not have probative force to establish that petitioner has engaged in subversive conduct or to establish that in his position of employment he "would endanger the security or defense of the nation and the state", and that using it as evidence thereof constitutes a denial of due process of law.

For these reasons, in my judgment, the order appealed from should be reversed.

DESMOND, DYE, FROESSEL and BURKE, JJ., concur with CONWAY, Ch. J.; FULD, J., dissents in an opinion in which VAN VOORHIS, J., concurs, in part, in a separate memorandum.

Order affirmed.

Order Appealed From

In the Matter of the Application of MAX LERNER,
Appellant,

For an order, etc.,

vs.

HUGH J. CASEY & others, constituting the New York City Transit Authority,
Respondents.

BE IT REMEMBERED, That on the 18th day of October, in the year of our Lord one thousand nine hundred and fifty-six, Max Lerner, the appellant—in this cause, came hereunto the Court of Appeals, by Leonard B. Boudin, his attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department.

And Hugh J. Casey, & ors., constituting the New York City Transit Authority, the respondents in said cause, afterwards appeared in said Court of Appeals by Daniel T. Scannell, their attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, the said Court of Appeals having heard this cause argued by Mr. Leonard B. Boudin, of counsel for the appellant—, and by Mr. Daniel T. Scannell, of counsel for the respondents, and by Miss Ruth Kessler Toch, of counsel for the Attorney General of the State of New York, pursuant to Section 71 of the Executive Law, brief

filed by amicus curiae, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

(s) Raymond J. Cannon,
Clerk of the Court of Appeals of
the State of New York.

Court of Appeals, Clerk's Office,
Albany, February 28, 1957.